

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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In the Matter of)
)
Preemption of Local Zoning Regulation) IB Docket No. 95-59
of Satellite Earth Stations) DA 91-577
) 45-DSS-MISC-93

Introduction

Pursuant to the Further Notice of Proposed Rulemaking released March 11, 1996, in the above-captioned proceeding, the Reston Home Owners Association submits the following Comments in response to proposed Section 25.104(f) to Chapter 47 of the Code of Federal Regulations which the FCC has issued pursuant to Section 207 of the Telecommunications Act of 1996.

Background

The Reston Home Owners Association, located in Reston, Virginia, is the second largest homeowners association in the country and one of the oldest. We have approximately 21,000 housing units, the majority of which are townhouses, condominiums and apartments. Almost 60,000 people call Reston their home.

Having recently celebrated our 30th anniversary, it is with great pride that I say Reston is still a very vibrant community. A community which recognizes and addresses the ever changing needs of its members. Whether the issue is sandboxes or satellite dishes, we have always been and continue to be a responsive and responsible community association.

Reston is wholeheartedly in agreement with the intent of the Telecommunications Act of 1996, which recognizes the changing telecommunications needs of the nation. Reston applauds this effort, and it is in this light that we respectfully submit our comments and suggestions addressing what we believe to be serious deficiencies in the proposed rule.

FCC's Position Regarding Nongovernmental Restrictions under Section 207 of the Telecommunications Act of 1996

Section 207 of the Telecommunications Act of 1996 (the Act) provides, in pertinent part, that

... the Commission shall ... promulgate regulations to prohibit ***restrictions that impair a viewer's ability to receive video programming services*** through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services. (Emphasis supplied.)

In its Report and Order (Report) and Further Notice of Proposed Rulemaking (Further Notice), the FCC has stated that while previously it had “consistently declined to consider the preemption of private covenants and deed restrictions that ban or inhibit installation of satellite antennas,...the 1996 Act directs the Commission to now undertake to prohibit the enforcement of such [nongovernmental] restrictions.” Further Notice at Paragraphs 54 and 62. The FCC specifically recognized that “Congress did not prohibit all regulations but rather only those that impaired reception....” Further Notice at Paragraph 59. Thus, the language of the following proposed new paragraph (f) for 47 C.F.R. Section 25.104 closely parallels the language of Section 207:

No restrictive covenant, encumbrance, homeowners’ association rule, ... shall be enforceable *to the extent that it impairs* a viewer’s ability to receive video programming services over a satellite antenna less than one meter in diameter. (Emphasis supplied)

On its face, however, the proposed rule does not provide any guidance either to the private individual or to the nongovernmental entity as to the meaning of impaired reception. Moreover, and contrary to its statement in Paragraph 59 previously quoted, the FCC has chosen to focus on and distinguish between the types of entities which promulgate restrictions (which restrictions may or may not affect reception) as well as the types of concerns that such entities have and address in their restrictions.

It is appropriate to accord private restrictions less deference [than state or local government restrictions] because non-governmental restrictions appear to be directed to aesthetic considerations. Further Notice at Paragraph 62.

Accordingly, the FCC not only proposes a different set of rules for private nongovernmental entities (a per se rule) than it proposed for state or local governmental entities (a rebuttable presumption rule), but has concluded that with respect to satellite antennas that are one meter or less there can be no aesthetic concerns regardless of whether the restriction is consistent with the federal interests of the Act. The FCC’s apparent intent in proposing 25.104(f) is entirely to preempt private restrictions.

FCC’s Authority and Mandate under Section 207 of the Telecommunications Act of 1996

It is well settled that a federal agency can only promulgate rules authorized by the enabling legislation. It cannot go beyond such authorization. The Act very clearly authorizes the FCC to issue regulations prohibiting restrictions that impair a viewer’s ability to receive video programming services. The legislative history shows that Congress’ intent was to limit such federal preemption of local or private restrictions to the extent contrary to the language of the Act. Despite its recognition that Section 207 is not a blanket authorization for it to issue regulations prohibiting all private restrictions which may affect reception of video programming services, however, the FCC apparently has done just that. In doing so, it has failed its Congressional mandate.

In order to comply with the Congressional mandate and promulgate regulations that focus on restrictions that impair reception, in our opinion the FCC obviously must first determine the meaning of

impaired reception. A reading of Webster's shows that impair is defined as "to decrease in strength, value, amount or quality." It is a decrease in the strength of the reception, value of the reception, amount of the reception or quality of the reception that Congress clearly had in mind in passing Section 207 of the Act.

Conditions Which do not Impair Reception are not Prohibited

Conditions on satellite antenna imposed by a community association, such as location and appearance of the satellite antennas, are not necessarily "restrictions that impair a viewer's ability to receive video programming services." As an example, Reston's architectural guidelines for antennae and satellite dishes focus on elements of design (e.g., its shape, material and color) and location (e.g., in relation to neighboring properties, and screening options). These architectural restrictions do not prohibit the homeowner from placing the satellite dish on his/her property nor do they diminish the homeowner's ability to receive video programming services. These restrictions do not decrease the strength, value, amount or quality of the reception.

The Association, in imposing these limited conditions, merely sets parameters on where the antenna should be located and what it should look like. The Act does not mandate that a homeowner be permitted to place such devices anywhere on his/her property. Rather, the Act requires only that the [private homeowners association] restrictions not diminish or weaken the homeowner's reception. Private restrictions such as these do not operate as complete bans nor do they limit reception, and are thus not inconsistent with the federal interests found in the Act, the FCC's comments at Paragraph 22 of the Report notwithstanding. Accordingly, absent a conflict between the private restriction and the Act, there can not be any federal preemption of such private restriction.

The Association recognizes, of course, that in very rare instances, a situation will arise where, for example, only one viable location for reception exists. If in that case the Association's objectives conflict with those of the Act, the Association's objectives clearly would be preempted. **In the vast majority of cases, however, where imposing location and/or appearance requirements will have no effect whatsoever on the homeowner's reception, the Act neither prohibits the Association from continuing to impose such restrictions on the placement of satellite dishes and antennae nor does it authorize the FCC to prohibit such restrictions.**

We suggest that in recognition of this, the FCC address in its rule the issue of burden of proof. For several reasons, we believe that the burden should be on the homeowner to show that the satellite antenna can not be placed on his/her property in compliance with the Association's restrictions either because (1) the location/appearance dictated by the Association impairs its ability to receive video programming services and/or (2) the location/appearance desired by the homeowner is the only alternative permitting such reception. First, the homeowner is in the best position of showing the association (either by site inspection or written professional documentation) that the association's restrictions impair reception on his/her property. Second, there often is no basis for the association to go on the homeowner's private property, short of being invited there by the homeowner for that purpose, to evaluate whether or not its restrictions on location/appearance impair the homeowner's reception.

Disparate Treatment Unauthorized by the Act

In Paragraph 25 of its Report, the FCC acknowledges that 47 C.F.R. Sections 25.104(a)-(e), which are based on presumptions of unreasonableness, are “less intrusive than a per se rule...” which is exactly what it has proposed for restrictions imposed by nongovernmental entities. The FCC’s conclusions that only local and state government’s health and safety concerns and other “unusual circumstances” fit within their presumption of accommodating local concerns, and that “...a locality cannot rebut the presumption covering small antennas with aesthetic concerns” (Report at Paragraph 35) have no basis in the Act.

While the FCC’s conclusion that it can accommodate local concerns is appropriate, its promulgation of the per se rule with respect to private nongovernmental restrictions is inappropriate and is based on its misinterpretation of the plain language of the Act. The FCC has made a presumption of unreasonableness with respect to any restrictions on satellites and antenna. The Act, however, only authorizes the FCC to prohibit restrictions which impair reception. While all restrictions that impair reception affect satellite/antennae, not all restrictions that affect satellite/antennae impair reception.

Recommendations

It should be patently obvious that without more specific guidance from the FCC, the likely and unfortunate result of its proposed rule will be a serious and real conflict between the individual and the private community association as to the proper interpretation of the Act, which ultimately could lead to litigation. To avoid this outcome and assist both the individual and the community association in interpreting the meaning and intent of the FCC rule, we strongly suggest that the FCC revise and expand on its proposed rule.

In our opinion, the objectives of Section 207 to prohibit restrictions that impair reception, and the objectives of private homeowners’ associations to permit the installation of satellite dishes/antennae with restrictions unrelated to reception ability, are not in conflict and can readily be met by the following additional language for new section 25.104(f):

Nothing in this section shall be deemed to interfere with the right of the nongovernmental entity to impose restrictions on the appearance or location of the satellite antennae, including the right to require the property owner to demonstrate that any such restriction does or will in fact impair reception, provided, however such restrictions do not impair reception.

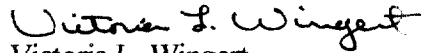
Conclusion

In our opinion, the FCC has acted outside the scope of the authorizing legislation by taking the unwarranted position that any private restriction on satellite antenna less than one meter in diameter is per se impermissible, and by attempting to prohibit the enforcement of private restrictions which permit the installation of satellite antennas, subject to certain conditions (primarily, appearance and location)

which do not in fact impair reception. As discussed above, we strongly urge the FCC to revise its proposed new paragraph (f) so as to be more in line with the letter and intent of Section 207 and so as to provide useful guidance to the millions of individuals who live in private community organizations.

On behalf of the Reston Association, I appreciate this opportunity to comment on the FCC's proposed rulemaking and would be more than happy to meet with representatives of the FCC to discuss this matter further.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Victoria L. Wingert". The signature is fluid and cursive, with a long horizontal stroke at the end.

Victoria L. Wingert

Executive Vice President